**Case No. 11-2057**

---

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

---

**UNITED STATES OF AMERICA,**

**Appellee,**

**vs.**

**CHRISTOPHER ELDER,**

**Appellant.**

---

**Appeal from the United States District Court**
**for the Western District of Missouri**
**Honorable Fernando J. Gaitan, District Judge**
**Case No. 4:08-cr-00026-FJG-4**

---

# BRIEF OF THE APPELLANT

---


**Dennis Owens, Attorney**
**7th Floor, Harzfeld's Building**
**1111 Main Street**
**Kansas City, Missouri 64105**
**Telephone: (816) 474-3000**
**Facsimile: (816) 474-5533**

**Jonathan Sternberg, Attorney**
***Jonathan Sternberg, Attorney, P.C.***
**7th Floor, Harzfeld's Building**
**1111 Main Street**
**Kansas City, Missouri 64105**
**Telephone: (816) 474-3000**
**Facsimile (816) 474-5533**

**Counsel for Appellant**
**Christopher Elder**


**ORAL ARGUMENT REQUESTED**

## Summary of the Case

Christopher Elder, M.D., a pain management physician from Houston, Texas, appeals from his conviction and sentence for conspiracy to distribute controlled substances and distributing controlled substances. The Government's case hypothesized that Dr. Elder had written illegitimate prescriptions for a conspiracy to obtain hydrocodone, alprazolam, and promethazine from Missouri and distribute the pharmaceuticals in Houston illicitly.

But even viewing the evidence in a light most favorable to the jury's verdict, the Government did not introduce sufficient evidence to prove beyond a reasonable doubt that any of the prescriptions were in any way outside the recognized standard of medical care. No witness testified as to what that standard of care was or that any of Dr. Elder's prescriptions were not within it. As such, the district court erred in denying Dr. Elder's motion for judgment of acquittal. The district court also erred in subjecting Dr. Elder to a $991,114.00 civil forfeiture order and denying his motion to sever his trial from that of his codefendant, Troy Solomon.

## Request for Oral Argument

The issues in this case are complex. The interchange of oral argument would assist the Court in understanding and deciding them. Because this appeal was consolidated with Dr. Elder's codefendant's appeal and the Government has cross-appealed, Dr. Elder requests at least thirty minutes for argument.

## Table of Contents

## Table of Authorities

### Cases



### United States Code

**Federal Rules of Criminal Procedure**



**Federal Rules of Appellate Procedure**

## Jurisdictional Statement

This is an appeal from a final judgment of conviction and sentence entered by the United States District Court for the Western District of Missouri in a criminal case that the Government had filed upon a grand jury indictment alleging violations of 21 U.S.C. §§ 841 and 846, pursuant to 18 U.S.C. § 2. The district court had jurisdiction pursuant to 28 U.S.C. § 1355(a).

The district court entered its final judgment imposing sentence on May 3, 2011. The appellant filed his Notice of Appeal on May 9, 2011. Under Rule 4(b)(1)(A)(i), Federal Rules of Appellate Procedure, the Notice of Appeal was timely, as it was filed within ten days of the district court's final judgment. Therefore, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

## Acknowledgement

Counsel for the appellant acknowledges the substantial contribution to the research and preparation of this brief of Benjamin Wheeler, a graduate of the University of Notre Dame School of Law.

## Statement of the Issues

I. The district court erred in denying Dr. Elder's motions for judgment of acquittal at the close of the Government's case and at the close of all evidence, because the Government presented insufficient evidence against Dr. Elder to prove conspiracy and illegal distribution of prescription medicine. There was no evidence that any prescriptions Dr. Elder issued were for anything other than a legitimate medical purpose.

*United States v. Cuong*, 18 F.3d 1132 (4th Cir. 1994)

*United States v. Moore*, 423 U.S. 122 (1975)

*United States v. Smith*, 573 F.3d 639 (8th Cir. 2009)

*United States v. Katz*, 455 F.3d 1023 (8th Cir. 2006)

21 U.S.C. § 841

21 U.S.C. § 846

II. The district court erred in joining Dr. Elder in its $991,114.00 civil forfeiture order, because a convicted defendant only can be ordered to forfeit property to the extent that the evidence shows he profited from the alleged criminal activity. There was no evidence whatsoever that Dr. Elder profited from his alleged criminal activity.

*United States v. Van Nguyen*, 602 F.3d 886 (8th Cir. 2010)

*United States v. Bucci*, 582 F.3d 108 (1st Cir. 2009)

18 U.S.C. § 981

21 U.S.C. § 853

Rule 32.2, Federal Rules of Criminal Procedure

III. The district court erred in joining Dr. Elder with Mr. Solomon, because the Government's case against Dr. Elder was such that a reasonable juror could not be expected to compartmentalize it versus the case against Mr. Solomon. The indictment did not charge Dr. Elder with participation in any financial aspect of the alleged conspiracy, and no evidence was introduced to show that he profited from any alleged criminal activity. The vast majority of evidence at trial concerned only Mr. Solomon and his illicit financial gain. Joining Dr. Elder with Mr. Solomon conflated the charges against him with the greater charges against Mr. Solomon and confused the jury.

*United States v. Jenkins-Watts*, 574 F.3d 950 (8th Cir. 2009)

*United States v. Liveoak*, 377 F.3d 859 (8th Cir. 2004)

Rule 8, Federal Rules of Criminal Procedure

Rule 14, Federal Rules of Criminal Procedure

## Statement of the Case

A grand jury charged Christopher Elder, M.D., a pain management physician in Houston, Texas, with one count of conspiring to distribute controlled substances and eight counts of distributing controlled substances, all in violation of the Controlled Substances Act. He was one of four defendants named in the 24-count indictment, though he was named only in the nine above counts.

The Government contended that Dr. Elder wrote illegitimate prescriptions for hydrocodone, alprazolam, and promethazine in furtherance of the other defendants' scheme to obtain those pharmaceuticals from Missouri and distribute them on the streets of Houston. Ultimately, the other two codefendants besides Dr. Elder and Troy Solomon pleaded guilty as part of plea agreements with the Government.

Dr. Elder moved to sever his trial from that of Mr. Solomon. The district court denied severance. Dr. Elder and Mr. Solomon were tried together before a jury over seven days in June, 2010. The jury convicted both of them of all counts. On May 3, 2011, the district court sentenced Dr. Elder to 15 months imprisonment and a fine of $4,500.00. The Court also issued a forfeiture judgment against Dr. Elder for $991,114.00, jointly and severally with all the other defendants.

Dr. Elder timely appealed to this Court. His appeal was consolidated with that of Mr. Solomon, as well as the Government's cross-appeal.

## Statement of Facts

### A. Dr. Elder's background and career

Appellant Christopher Elder, M.D., is a physician in Houston, Texas (Transcript 693). After earning his undergraduate degree at the University of Virginia, he attended medical school at the University of Pennsylvania, where he also completed his internship (Tr. 1207-11). Thereafter, he took his residency at Baylor University in Waco, Texas (Tr. 1212-13). He is "double board certified" in both pain management and "physical medicine and rehabilitation" (Tr. 434, 437-38, 694, 1213).

In 2004, about one year after Dr. Elder completed his residency, a fellow Baylor resident alum, Okezie Okezie, recommended him to Pleshette Johnson, a chiropractor who owned a pain management and chiropractic clinic in Houston named the South Texas Wellness Center ("STWC") (Tr. 470, 543, 1219-20, 1228). Dr. Elder met with Dr. Johnson, her mother, Ada Johnson, and Troy Solomon, who Dr. Elder was informed was the Johnsons' "financial backer" in STWC (Tr. 472, 1219-20). Mr. Solomon had invested $30,000.00 in STWC (Tr. 477-480, 483, 485, 548-551, 553-55). As of July or August, 2004, Dr. Elder agreed to take a part-time position at STWC (Tr. 1222). He worked on a *locum tenens* basis, meaning that he was an independent contractor (Tr. 1222). By the end of 2004, Dr. Elder had earned $5,000.00 working at STWC (Tr. 1223).

Mr. Solomon primarily was a pharmaceutical equipment sales representative in Houston (Tr. 777, 1071-72). In 2004, he opened a side-venture with Phillip Parker called Ascensia Nutritional Pharmacy, in which he and Mr. Parker were half-owners (Tr. 491-94, 707-713, 766-68, 1075, 1079-80). Ascensia was located in the same building as STWC (Tr. 1081-84). Mr. Parker was the daily manager of Ascensia, while Mr. Solomon continued his job in pharmaceutical sales (Tr. 549, 564).

On January 1, 2005, Dr. Elder left STWC (Tr. 1244). He said he terminated his *locum tenens* position because he had professional and personal differences with Dr. Johnson and her mother, who he stated had tried to direct how he cared for patients (Tr. 1246-47). In total, he worked at STWC for four months (Tr. 1324). Around the same time, Mr. Solomon pulled out of STWC as an investor (Tr. 523-24).

Because of STWC's proximity to Ascensia, Dr. Elder met Mr. Solomon while working at STWC; they struck up a casual friendship (Tr. 1124, 1247-50). Mr. Solomon described their relationship as being "phone pals" – that is, they did not socialize in person, but would talk about shared interests on the phone (Tr. 1124, 1248-49). In 2004 and 2005, there were about 400 phone calls between Dr. Elder and Mr. Solomon, though the calls were more frequent in 2004 (Tr. 1248-49). Dr. Elder testified they mostly talked about "guy stuff" like sports and poker,

but also that he sometimes would give Mr. Solomon informal medical advice (Tr. 1248-49). An investigator later testified Dr. Elder told her the last time he spoke with Mr. Solomon was in April, 2005, but phone records showed the two had spoken for eleven minutes on May 3, 2006, the same day as the DEA's search at Ascensia, and again briefly the next day. (Tr. 703-05).

Dr. Johnson testified that Dr. Elder saw only 4-5 patients per day at STWC, and then only two days a week; she said that, sometimes, he had no patients at all (Tr. 476-77). The Government's investigation turned up records of prescriptions for 544 patients Dr. Elder had written in his four months at STWC (Tr. 1308-09). Dr. Elder was questioned as to how he could have seen 544 patients if he only saw 4-5 patients per day (Tr. 1324-28). He stated that Dr. Johnson was incorrect about his patient load and she had not been at STWC to watch him; in fact, he had seen 20-30 patients per day (Tr. 1325-26). Still, even at a "conservative view" of 40 days at STWC seeing patients, he only would have had to see 10.35 patients per day to have reached a total of 544 (Tr. 1367-68).

Dr. Johnson testified that, initially, she told her patients they could fill their prescriptions next door at Ascensia (Tr. 513-14). She said that, later in 2005, after Dr. Elder had left STWC, she instructed that prescriptions not be given to patients, but instead faxed directly to pharmacies, to avoid patients taking their scripts and duplicating them (Tr. 513-15).

Dr. Elder echoed this, though with a slightly different timeline. He testified he initially handed his patients' prescriptions to them, but then changed this when Dr. Johnson instructed him to keep the original prescriptions in the patients' files and told him STWC would fax them to the patients' pharmacies (Tr. 1225-28). He said that while this seemed odd, it was not unique because he had seen this prescription-faxing practice during his residency (Tr. 1225-28). He testified that he never steered his STWC patients to any particular pharmacy (Tr. 1313-18).

One month after Dr. Elder left STWC in January, 2005, he began working at the Westfield Medical Clinic ("WMC"), a pain management clinic in Houston (Tr. 648-49, 1251). WMC's director and general manager was Diane Hearn, who testified for the Government (Tr. 648). WMC was a cash-based business, because none of its patients had insurance (Tr. 670-71). Ms. Hearn stated that many of the patients at the pain management clinic received prescriptions for hydrocodone and other narcotic painkillers (Tr. 671).

Dr. Elder worked at WMC full-time, four-and-a-half days per week, seeing 40-50 patients each day (Tr. 650-51). Initially, he was the only physician there, though there were four other employees (Tr. 649, 1258). He was paid $30.00 per patient, earning approximately $8,000.00 per week (Tr. 650-51, 669-70). At the end of his year at WMC, WMC provided him an IRS Form 1099 recounting total earnings of $200,000.00 (Tr. 648-651, 672) Ms. Hearn stated that because he was

paid by-the-patient, Dr. Elder requested photocopies of all prescriptions he wrote so he could track how many patients he saw (Tr. 653-54, 665).

Dr. Elder echoed this, though he specified that he only asked for photocopies for two months, until he was comfortable with Ms. Hearn (Tr. 1254-55). Ms. Hearn testified Dr. Elder was medically very strict and obtaining a prescription from him was difficult (Tr. 665-69). She stated she knew what a "pill mill" was, and she testified that Dr. Elder was not engaging in any "pill mill" activity while he worked for her (Tr. 665-69, 673). She stated that Dr. Elder handled prescriptions and records "the right way … He insisted on it. He ran a tight ship." (Tr. 666). She did not believe Dr. Elder was doing anything wrong while he worked at WMC, and she was offended that any charges ever were brought against him (Tr. 665).

Though Dr. Elder's patients could choose any pharmacy to fill their prescriptions, C&G Pharmacy was next door to WMC (Tr. 1257). As a result, he figured that most of his patients simply would be going to C&G to fill their prescriptions (Tr. 1267-68). There were about five employees at C&G (Tr. 1258). Between WMC and C&G, as many as eight or ten people had access to Dr. Elder's prescriptions (Tr. 1257-58).

Ms. Hearn testified that Dr. Elder did not bring any of his patients from STWC to WMC (Tr. 650). Dr. Elder disagreed; as he eventually told DEA

investigator Judi Watterson in an interview in 2006, about 70 of his STWC patients followed him to WMC (Tr. 693-99).

**B. Pain pharmacology and prescription methods**

Dr. Elder testified that, at both STWC and WMC, he wrote "no refills" on every prescription (Tr. 1261). He uses this practice to (1) ensure patients are compliant with the medications given, (2) generate another office visit for business purposes (i.e. to make money), and (3) require the patient to come back so he can perform a functional evaluation to ensure the medication is working (Tr. 1261-65). Signing off on batches of refill orders would not have met these objectives (Tr. 1265). Dr. Elder testified that never in his career has he written a prescription for a patient who did not exist, let alone one he did not see (Tr. 1261-65).

For a prescription for hydrocodone, alprazolam, or promethazine to be valid in the State of Texas during 2004 and 2005, a doctor simply needed to include the patient's name, the quantity of medication, instructions for dispensing the medication, and his DEA number (Tr. 266-67, 938, 961-62, 1267-69). While the date generally should be included, both Dr. Elder and the Government's expert testified that a lack of a date did not make a prescription *per se* invalid or unlawful as long as it was not for a Schedule II substance, which hydrocodone and alprazolam are not; if the pharmacist needed the date of the prescription, he simply could call the physician's office to find out (Tr. 961-62). Indeed, the

Government's expert admitted that he, too, had not written dates on prescriptions on occasion (Tr. 961-62). A C&G pharmacist testified that the State of Texas simply did not require any patient address or date of birth on a non-Schedule-II prescription until 2008 (Tr. 621-28).

Most of the prescriptions introduced into evidence in this case were hydrocodone, alprazolam, and promethazine (Tr. 427-29; Government's Exhibit 1092), though seven were for Lorcet and Xanax (Tr. 423-24; Govt. Ex. 1089, 1090). Many of the prescriptions in each batch of patients appear to be nearly identical: that is, they are the same combinations of medicines at the same dosage levels (Tr. 944-46). Missouri Board of Pharmacy inspector Frank Van Fleet, who testified for the Government, acknowledged that hydrocodone and alprazolam often are prescribed together to alleviate both pain (hydrocodone) and the anxiety that accompanies it (alprazolam) (Tr. 434, 437-38).

Government witnesses questioned the medical propriety of Dr. Elder prescribing many patients the same two drugs, hydrocodone and alprazolam, in the same amounts (Tr. 437-38, 937-383). Dr. Richard Lloyd Morgan, a private practitioner in Kansas City who also practices pain management, testified as a Government expert that a physician should consider all medicines very carefully when prescribing them and tailor the prescription specially to each patient (Tr. 940-41). He testified that Dr. Elder's use of the same medications and dosages in

multiple patients was unusual (Tr. 986-88). He also found it unusual that Dr. Elder would prescribe both hydrocodone and promethazine together, because both substances do the same thing, though differently (Tr. 944-46). Additionally, he testified that promethazine can be abused (Tr. 947-49).

Dr. Morgan acknowledged that many patients treated for pain are dependent on their medications, though not "addicted" to them (though it can turn into addiction) (Tr. 977-78). As a result, it is not unusual for some patients to use false identification to scam doctors in order to obtain their medicine; even Dr. Morgan had been scammed this way (Tr. 978-80). He admitted that these abuse-prone medications are prescribed more often for low-income, cash-only patients like Dr. Elder's because they cannot afford more expensive diagnostic and treatment options (Tr. 980-83).

C&G pharmacist Sunny Chin and his assistant, Magdalena Ortega, however, both testifying for the Government, saw nothing unusual about Dr. Elder's prescriptions (Tr. 621-28, 637-47). Mr. Chin testified that, both at STWC and WMC, Dr. Elder worked with low-income patients in the neighborhood who Mr. Chin personally knew, the patients personally brought the prescriptions in from Dr. Elder to be filled; reviewing 44 prescriptions the Government introduced into evidence, Mr. Chin saw nothing irregular about them (Tr. 621-28; Govt. Exs. 261-305). Ms. Ortega agreed; she testified it was not unusual for a pain management

physician like Dr. Elder to write a series of prescriptions for different patients but for the same medications at the same dosages (Tr. 637-47).

Dr. Elder, too, defended this practice; he pointed to a published guide for doctors titled PAIN MEDICINE, A COMPREHENSIVE REVIEW, SECOND EDITION, written by a physician (Tr. 1231-32; Elder Exhibit 59). As per this treatise, there is nothing unusual about prescribing the same pain medication to many different patients for apparently different types of pain (Tr. 1231-32). Rather, anti-anxiety medications, including alprazolam, can be used to alleviate pain in conjunction with other pain killers (Tr. 1232-34). Thus, he testified that, while "Every patient is different," "You can use the same medication to treat different conditions" (Tr. 1234-35). This is especially true in the realm of pain management (Tr. 1235-37).

**C. Mr. Solomon's scheme with the Medicine Shoppe**

Cindy Martin met Mr. Solomon in 2000 (Tr. 337-60). They had a two-year romantic relationship, but remained friends afterward (Tr. 388-89). In August, 2004, Mr. Solomon asked Ms. Martin whether she knew any pharmacists who would be interested in filling prescriptions by mail for "high profile" customers seeking confidentiality (Tr. 360-66). Ms. Martin contacted her friend, Mary Lynn Rostie, a pharmacist for over 30 years (Tr. 239, 360-69).

Beginning in 2001, Ms. Rostie owned the Medicine Shoppe, a pharmacy in Belton, Missouri (Tr. 136, 239, 274). She had known Ms. Martin for ten years,

from when both of them had worked at a pharmacy in Texas (Tr. 241). Ms. Rostie testified that, in August, 2004, Ms. Martin approached her about a business proposal involving Mr. Solomon and filling prescriptions from the Houston area (Tr. 241). Ms. Rostie was interested and she spoke with Mr. Solomon over the phone regarding medicine prices and how medicines could be shipped from Missouri to Houston (Tr. 245). In September 2004, she started filling prescriptions for Ascensia (Tr. 248-49).

After a Houston doctor would examine a patient and prescribe medication and the patient took his prescription to Ascensia, the prescription would be faxed to the Medicine Shoppe in Belton, often in the evening from Mr. Solomon's home (Tr. 136-37, 167, 171). Ms. Martin also brought in Texas prescriptions in person (Tr. 148-49).

When personal information like a patient's birth date or address was missing, Ms. Rostie or one of her pharmacy techs would send a request to Mr. Solomon for the data, who would respond back (Tr. 154, 163-164, 166-181; Govt. Exs. 49, 51, 456, 458-462, 466-67, 516, 520). Ms. Rostie testified that Mr. Solomon told her to ask these questions to him, rather than the physicians, because he could obtain the information more quickly (Tr. 243-58).

Two of Ms. Rostie's techs testified that, in the conversations they had with Mr. Solomon, he never gave indication that there was anything illegal going on; he

also never gave any directions to them, but simply answered their questions (Tr. 140, 195-98). When a prescription was for a refill, Ms. Rostie or one of the techs would fax a refill requests to Mr. Solomon, purportedly for Dr. Elder to sign. (Tr. 169-170, 174-75, 177-78, 209-211). Mr. Van Fleet found it unusual that refill authorization requests were faxed to Mr. Solomon rather than the physician himself (Tr. 439-40). He testified, though, that he did not conduct any investigation into the prescriptions, and he did not contact Dr. Elder or Mr. Solomon to inquire about this practice (Tr. 445-48).

Mr. Solomon admitted he had indeed faxed prescriptions bearing Dr. Elder's and Dr. Okose's names from his home to the Medicine Shoppe (Tr. 1128-29; Govt. Exs. 40, 45, 47, 51, 54, 458, 460-62, 466-68, 470-2, 475-78, 481-82, 493, 495-97, 500-02, 503, 506, 508, 511-12, 514-16). He further stated that, when the Medicine Shoppe sent him a fax requesting Dr. Elder's signature to approval of refills, he would give the fax to Mr. Parker, who would obtain the signature and return it to him, whereupon he would fax the signature back to the Medicine Shoppe (Tr. 1133-36).

After the prescription was received and satisfactorily completed, Ms. Rostie's staff would fill the prescriptions and send them down to STWC or Ascensia (Tr. 195-98). The medicine was shipped to Houston via FedEx, using Ms. Rostie's account (Tr. 243-58, 263). There, the patients would retrieve their

medicine and pay for it (Tr. 137-38, 141, 148-51, 174). After that, Mr. Solomon would send Ms. Rostie a payment through Ms. Martin via UPS, who was paid a "broker's fee" of $5.00 per prescription (Tr. 258-61, 360-69). Mr. Solomon sent 19 mailings to Cindy Martin in 2004 and eleven in 2005 (Tr. 456-463, 468). Jill Gerstner, one of Ms. Rostie's techs, kept a journal tracking prescriptions shipped to Houston, as well as their corresponding payments (Tr. 190-93). Ms. Rostie's total profit from this scheme was $991,000.00, which she used to remodel the Medicine Shoppe and for a down payment on a new home (Tr. 308).

Between October, 2004, and October, 2005, Ms. Martin made a total of $71,666.80 in cash deposits (Tr. 888-90). Ms. Rostie's company deposited a total of $2,943,653.37 between August, 2004, and October, 2005 (Tr. 888-90). In 2004, Mr. Solomon filed a tax return omitting $11,550.00 in income from Ascensia (Tr. 890-92; Govt. Ex. 1120). The following year, Mr. Solomon's tax return stated his income was $59,130.00, while Ascensia had made $718,094.00 in deposits, $369,000.00 of which was in cash (Tr. 890-92; Govt. Ex. 1121). The Government's financial expert was not asked to analyze Dr. Elder's income (Tr. 892-96).

Pleshette Johnson testified that many shipping boxes began arriving at Ascensia soon after it opened in 2004 (Tr. 491-94). She admitted that, on occasion, STWC employees would sign for the deliveries if no one from Ascensia

was available (Tr. 491-94). She said Mr. Solomon told her the boxes contained vitamins and supplements, though she never tried to verify this (Tr. 491-94).

Usually, Mr. Solomon would send his payments to Ms. Rostie in increments between $5,000.00 and $15,000.00 in an envelope in a bag, always in cash (Tr. 258-59). Ms. Martin testified Mr. Solomon would call her before a shipment of cash was mailed to her, usually once or twice per week (Tr. 370). Ms. Martin testified Mr. Solomon warned her not to deposit more than $10,000.00 into the bank at one time (Tr. 369-71). Ms. Martin claimed she became concerned about these practices a few months later, in December, 2004, or January, 2005, when the volume of orders increased (Tr. 371-72).

Lillian Zapata was a pharmacy tech at Ascensia from January to October, 2005 (Tr. 837-88, 856). During this time, she briefly dated Mr. Solomon (Tr. 854). She testified that, on one occasion, when she and Mr. Solomon were driving in Houston, he pulled over to the side of the road in "a part of Houston [she] would consider the ghetto," retrieved a box from the back of the car, and gave it to a person who had pulled up in a car next to them (Tr. 855-56). She said that, when Mr. Solomon got back into the car, he remarked, "I bet you didn't know you were riding with three million dollars" (Tr. 855-56).

Ms. Martin neither met nor ever spoke with Dr. Elder (Tr. 409). Ms. Rostie never met Dr. Elder (Tr. 264). Nearly all the prescriptions Ms. Rostie received

from Texas, however, appeared to come from Dr. Elder, a Dr. Peter Okose, or a Dr. Juan Botto (Tr. 125-27, 257-58). In investigating the Medicine Shoppe, Mr. Van Fleet found a bundle of 56 prescriptions, all for different patients, but all written by Dr. Okose and preprinted for the same two types of medicine, Lorcet 10/650 mg, and Soma, 350 mg, which he found unusual (Tr. 416-17, 419-20; Govt. Exs. 1085-86). Of those 56 Okose patients, 32 had the last name of Johnson (Tr. 201-02). This was described as an "alphabet soup" method – "A. Johnson, B. Johnson, C. Johnson," etc., as if going through a phone book; none of the prescriptions bearing Dr. Elder's name exhibited this characteristic (Tr. 151-66, 179-90, 202, 212-13).

Between September, 2004, and October, 2005, the Medicine Shoppe filled 4,466 prescriptions for hydrocodone 10-500 mg, 11,985 prescriptions for hydrocodone 10-650 mg, and 2,861 prescriptions for alprazolam 2 mg (Tr. 424-26, 442; Govt. Ex. 1091). 10,959 of the hydrocodone prescriptions (including both new orders and refills) had Dr. Okoze's name on them (Tr. 427). 15,504 of the prescriptions for hydrocodone, alprazolam, and promethazine had Dr. Elder's name on them (Tr. 428-29; Govt. Ex. 1092). Seven prescriptions for Lorcet and Xanax, all for the same strength and quantity, had Dr. Elder's name on them; these were for patients Adams, Bram, Knack, Paz, Perry, Ruffin and Saliba (Tr. 423-24; Govt. Exs. 1089-90).

Ms. Rostie testified that none of Dr. Elder's supposedly illicit prescriptions the Government showed her on direct exam were invalid (Tr. 266-70, 283). Nor were the refill requests that did not bear Dr. Elder's signature; she testified that signatures on refill requests did not have to be from the actual prescribing doctor, but rather could be written by the doctor's agent (Tr. 264-66, 279). Indeed, Ms. Rostie testified that, though she had not personally met Dr. Elder, she had spoken with him via telephone (and, she said, later with Dr. Okose) confirmed that the prescriptions she received in his name were legitimate (Tr. 286-87, 290). Dr. Elder denied ever having spoken with Ms. Rostie (Tr. 1267-69). She said Mr. Solomon had directed her to ensure all prescriptions and their administration were handled legitimately (Tr. 296). She said that, one time, she found an identical prescription purportedly written by Dr. Okose to one Dr. Elder previously had written; Mr. Solomon instructed her not to fill either one (Tr. 287-88).

At trial, the DEA investigator, Ms. Watterson, testified about various prescriptions the Medicine Shoppe filled bearing Dr. Elder's name that she found suspicious. One was for a patient named Cache Doria Perry, whose address was listed as the residence of Mr. Parker and Mr. Johnson, Mr. Solomon's coworkers at Ascensia, and which happened to be a townhouse Mr. Solomon owned (Tr. 720-22). Ms. Rostie had noted on the prescription that it had been "verified with Troy via phone" (Tr. 720-22; Govt. Ex. 37).

Two other prescriptions were for Cecilia Paz, one in August, 2004, bearing Dr. Elder's name, and another in January, 2005 bearing Dr. Botto's name, but using two different addresses, one in Corpus Christi, and the other in Houston; the street address in both cities was listed as being on 7th Street (Tr. 723-725). Ms. Watterson testified that prescriptions for Amanda Allen (count three of the indictment) and Lindsay Lewis (count four of the indictment) bore addresses that were on a list of four provided by the Postal Service as unverifiable (Tr. 726-29). Two others, for Mark Ivey (count five of the indictment) and Cheryl Zarsky (count six of the indictment) bore irregularities in their addresses (Tr. 726-29). All four names appeared on prescriptions Mr. Solomon had faxed to the Medicine Shoppe (Tr. 726-729).

Reviewing these four prescriptions, Dr. Elder testified that they indeed had been real patients, but he had not written their addresses on the original prescriptions because, again, Texas did not require this (Tr. 1278-80). He stated the addresses plainly had been written in by someone else (Tr. 1278-80). Ms. Watterson admitted that Amanda Allen's address, alleged to be on a street named "Makey," had been handwritten on the prescription and subsequently typed into a computer system; she further admitted that, while "Ma*k*ey" does not exist in the U.S Postal Service's registry, a street named "Ma*x*ey" does (Tr. 772-73).

The Government's expert, Dr. Morgan, also reviewed these four prescriptions; while he found the faxes of them to be unusual, he acknowledged that all four indeed were all different (Tr. 963-97). Two had been written on October 19, 2004, and two had been written on October 26, 2004, and the directions for use differed in each (Tr. 963-97). He testified that, "without having the full patient record and everything here to review today, you can't second guess what [Dr. Elder] did in those four cases" (Tr. 967). He stated all four prescriptions appeared regular "on their face" and there was "nothing unusual or sinister about them" (Tr. 967).

Ms. Watterson said she charted the number of prescriptions filled at the Medicine Shoppe that Dr. Elder wrote between August 17, 2004, and October 26, 2004, as well as when they were refilled by fax, some as much as ten to twelve times (Tr. 746-751; Govt. Exs. 1116-17). She said she found prescriptions at the Medicine Shoppe that Dr. Elder had written both when he worked at STWC and when he worked at WMC (Tr. 730-31). She also said she found approximately 90 prescriptions that had been filled at both C&G in person and at the Medicine Shoppe via fax; another 84 were filled at C&G and later repeated at Ascensia (Tr. 736-46).

Additionally, Ms. Watterson stated that four prescriptions found at the Medicine Shoppe that bore Dr. Elder's name were for people who actually were

deceased. (Tr. 752-56). One witness, Doris Crooks, a Houston resident whose name appeared on a prescription apparently from Dr. Elder that was filled at the Medicine Shoppe in August, 2004, testified that she never had been Dr. Elder's patient, either at STWC or anywhere else (Tr. 1376-83). The address on her prescription was slightly incorrect (Tr. 1377). She testified, however, that she had lost her driver's license in September, 2004 (Tr. 1378-79). A copy of her license, missing her photograph, was found at the Medicine Shoppe; she could not explain how this happened, though she agreed it was possible someone had stolen her identity (Tr. 1378-83).

Dr. Elder explained that the prescriptions for deceased people and Ms. Crooks were entirely possible because he examined thousands of people, he is not infallible and, as the Government's expert Dr. Morgan had echoed, identity theft is common in pain management practice for low-income individuals and can go undetected by both the doctor and his staff. (Tr. 978-80, 1288-91, 1384-88). He insisted that every prescription he ever had written occurred after he met with the actual patient (Tr. 1388).

Examining another batch of Dr. Elder's prescriptions, Dr. Morgan testified they were unusual in that they all called for the same drug, but acknowledged that pain management physicians recently had begun to favor opioids as a treatment method because of severe side-effects, including death, that occasionally resulted

from nonopiods (Tr. 969-72). Moreover, he noted that all of Dr. Elder's *original* prescriptions mandated "no refill," which was prudent with new patients because the patient's tolerance for the medicine is not yet known (Tr. 969-973, 983-84).

After Dr. Elder left STWC in January, 2005, Mr. Rostie continued to fill prescriptions for Dr. Okose and Dr. Botto (Tr. 273). She still continued mailing medications to STWC, because Mr. Solomon requested her to (Tr. 274). Some of those prescriptions expressly stated "no refill," but they were filled anyway (Tr. 274). Ms. Rostie continued to receive prescriptions bearing Dr. Elder's name after January, 2005, though none were originals and she knew he was no longer working at STWC; again, she filled them anyway (Tr. 280). She said she had contact with the other doctors at STWC during this period, but never attempted to contact Dr. Elder (Tr. 282).

**D. Dr. Elder's response when confronted with the Medicine Shoppe scheme**

Dr. Elder testified he was never aware that any of his prescriptions were being faxed to Missouri or that the prescribed medications were being shipped from Missouri to Texas (Tr. 1224-25, 1238-40). He had no idea how any copies of his prescriptions wound up in Missouri (Tr. 1260-61). He suspected Dr. Johnson was involved in this, because she had admitted that she faxed prescriptions to pharmacies and kept originals at the clinic (Tr. 1313-18). After all, his patient files at STWC were located behind the reception area, and thus were accessible to Dr.

Johnson (Tr. 1225-28, 1324-26). He testified that he never had taken any patient files from STWC, because the clinic owned the files, not the physician, and especially not him as a *locum tenens* physician (Tr. 634-35, 1281-87; Govt. Ex. 1047). While Dr. Johnson had claimed that Dr. Elder kept patient files in his truck, which later was stolen, Dr. Elder denied this, too (Tr. 1281-87).

From the beginning of the DEA's investigation, Dr. Elder denied that Mr. Solomon had asked him to write prescriptions for Mr. Solomon to fill (Tr. 700-02). He confirmed having written prescriptions in his name later found at the Medicine Shoppe,, but he denied initialing for refills on fax transmittal sheets (Tr. 700-02).

Dr. Elder vehemently denied having been a part of any scheme to have prescriptions filled in Missouri, sent back to Texas, or improperly distributed (Tr. 1353-56). At trial, Dr. Elder was unable to recall any details about his STWC patients, six years later, simply by examining their prescriptions (Tr. 1310-1313).

Dr. Elder introduced his e-mail history into evidence, which showed he had never e-mailed Mr. Solomon, Ms. Rostie, Ms. Martin, or any of the others involved in this case (Tr. 1241-43). Dr. Elder also testified he had not written his initials to approve any of the refills appearing on the nine faxes the Medicine Shoppe sent to Ascensia seeking his approval while he worked at STWC (Tr. 1244-45). He testified the same as to the 34 faxes sent after he had left STWC (Tr. 1244-45).

Besides not knowing that the Medicine Shoppe in Missouri was involved in filling any of his prescriptions, Dr. Elder also denied having written any dates or addresses on any of the prescriptions found in the Medicine Shoppe's records (Tr. 1228-30). When asked about groups of between 80 and 100 prescriptions bearing the same date, he supposed that they had been held back and faxed to Missouri all at the same time (Tr. 1228-30). Dr. Elder also denied having signed for two FedEx packages from the Medicine Shoppe, stating instead that the signatures on the packing slips were forgeries (Tr. 1351-53; Govt. Exs. 625-26). Indeed, his signature on the one package that did appear to have it actually was not his handwriting (Tr. 1287-88).

At trial, the Government showed Dr. Elder 41 prescriptions he wrote at WMC on February 1 and 2, 2005, which were filled next door at C&G Pharmacy, but which the next day all had been faxed to Missouri from Mr. Solomon's residence (Tr. 1331-36; Govt. Exs. 52-53, 261-62). Dr. Elder had prepared a list of those same patients, with their addresses and dates of birth (Tr. 1339-49). This list, too, was faxed to Missouri on February 3 minutes after copies of the original prescriptions (Tr. 1339-49). Dr. Elder admitted to making the list so he could track his patient count at WMC to ensure he was being compensated properly, but he denied knowing anything about it having been faxed to Missouri (Tr. 1339-49). The Government introduced Mr. Solomon's phone records suggesting that, on the

evening of February 3, 2005, he had attempted to call Dr. Elder twice (Tr. 1365-67, 1370-71).

Ms. Watterson admitted that, in sharp contrast to Mr. Solomon, Ms. Rostie, and Ms. Martin, there was no evidence that Dr. Elder ever had made any money from Mr. Solomon's scheme with the Medicine Shoppe; actually, he received tax refunds in 2004 and 2005 even after an IRS audit (Tr. 797, 894-95). Even through his trial in June, 2010, the DEA continued to permit Dr. Elder to prescribe pain medications including hydrocodone and alprazolam (Tr. 808-09).

In 2008, the Texas Medical Board questioned Dr. Elder about the prescriptions he wrote for Amanda Allen, Lindsay Lewis, Mark Ivey, Cheryl Zarsky, Jean Greenwald, and Alexander Thang (Tr. 1361-64; Govt. Ex. 1221). At trial, Dr. Elder testified he personally had examined and treated these patients, though without any specific recollection of them, but he had told the Texas Medical Board that, to the best of his knowledge, he had not been their physician (Tr. 1361-64; Govt. Ex. 1221).

**E. Investigation**

On October 20, 2005, Mr. Van Fleet and other inspectors from the Missouri Board of Pharmacy engaged in a routine inspection of the Medicine Shoppe (Tr. 136, 141, 318, 413-24). There, they found documents showing that Ms. Rostie was filling large numbers of prescriptions for hydrocodone, alprazolam, and

promethazine with codeine issued by doctors in Houston (Tr. 413-24). Ms. Rostie told Mr. Van Fleet about how Ms. Martin and Mr. Solomon at Ascensia had brought her this business (Tr. 413-24).

In response to this unusual activity, Mr. Van Fleet sent a letter to Dr. Okose's office, seeking more information about the large number of his prescriptions found in Missouri (Tr. 413-24). Although Dr. Okose's office manager confirmed the prescriptions, Mr. Van Fleet decided to contact called the DEA anyway (Tr. 420-23). Ms. Watterson was the DEA investigator who responded (Tr. 691-92). Ms. Watterson testified that the United States Attorney's office ultimately instructed her to withhold writing her investigative report, something she never had been asked to do in her 25 years of employment with the DEA (Tr. 789-90).

The DEA engaged in a series of interviews and searches. It searched WMC on May 2, 2006 (Tr. 1281-82). On May 3, 2006, it searched STWC, Ascensia, Dr. Okose's office, and another pharmacy in Houston (Tr. 764). That same day, Ms. Watterson interviewed Mr. Solomon (Tr. 708-10). The DEA searched the Medicine Shoppe on May 10, 2006, and seized boxes of stored prescriptions and other records (Tr. 108-11, 141). On October 25, 2006, Ms. Watterson interviewed Dr. Elder (Tr. 692-707).

Through their inspections, interviews, and searches, the Missouri Board of Pharmacy and the DEA discovered that Ascensia and the Medicine Shoppe were the largest purchasers of hydrocodone in their respective areas (Tr. 604-09, 890).

In October, 2006, a grand jury subpoena for Dr. Elder's patient records was served on STWC (Tr. 502-07; Govt. Ex. 1198). When looking for the files in response to the subpoena, Dr. Johnson could not locate 110 of them (Tr. 502-07). She testified she called Dr. Elder, who told her he had the charts but they were destroyed when his truck was stolen (Tr. 502-07). In contrast to Dr. Elder, Dr. Johnson claimed that the files belonged to Dr. Elder, not the clinic (Tr. 533-34).

**F. Proceedings below**

On February 6, 2008, a grand jury returned a 24-count indictment against Ms. Rostie, Ms. Martin, Mr. Solomon, Delmon Johnson, and Dr. Elder (Record 42). The indictment only named Dr. Elder in count one and counts three through ten (R. 46, 51, 53). Count one alleged conspiracy to distribute controlled substances (R. 46-49). Counts three through ten alleged distributing controlled substances (R. 51-54).

The remaining counts against the other defendants included conspiracy to commit money laundering (all the others), distribution of controlled substances (Ms. Rostie and Mr. Solomon), unlawful use of a communications facility (Ms.

Rostie), concealment money laundering (Ms. Rostie and Ms. Martin), and transactional money laundering (Ms. Rostie) (R. 42-79).

Ms. Rostie entered into a plea agreement with the Government; 18 of the charges against her were dismissed, only leaving two (Tr. 304). She also surrendered her pharmacy license (Tr. 306). Ms. Martin also entered into a plea agreement with the Government (Tr. 340-41). As part of the deal, the Government dismissed all counts against her, too (Tr. 398-99).

Ultimately, only the charges against Mr. Solomon and Dr. Elder went to trial (Tr. 1). Both Mr. Solomon and Dr. Elder moved to sever their trials (Appendix 4, 18, 48). Dr. Elder filed his motion to sever on March 23, 2008 (Appx. 4, 48). Mr. Solomon filed his on December 15, 2008 (Appx. 18). On April 2, 2009, Magistrate Judge Sarah Hays denied all of these motions (Appx. 21-22, 52).

The Government's cases against Mr. Solomon and Dr. Elder were tried to a jury over seven days in June, 2010 (Tr. 2-8). The vast majority of the Government's evidence, however, concerned Mr. Solomon and his scheme with the Medicine Shoppe, not Dr. Elder's alleged involvement. Of the Government's 25 witnesses, only eight testified directly about Dr. Elder's actions: Ms. Rostie (Tr. 238-323), Mr. Van Fleet (Tr. 412-56), Dr. Johnson (Tr. 469-558), Mr. Chin (Tr. 621-29), Ms. Ortega (Tr. 629-48), Ms. Hearn (Tr. 648-74), Ms. Watterson (Tr. 690-823), and Dr. Morgan (Tr. 937-89). The rest testified only about the actions of

Mr. Solomon, Ms. Rostie, and Ms. Martin. At the close of the Government's case-in-chief, Mr. Solomon and Dr. Elder both moved for judgments of acquittal, which the district court denied (Tr. 989-96). Both Dr. Elder and Mr. Solomon testified in their own respective defenses, and Dr. Elder testified again on surrebuttal (Tr. 1057-1176, 1204-72, 1384-88).

The jury convicted Dr. Elder of all charges (R. 117). On May 3, 2011, the district court then sentenced him to 15 months in prison on each count, to be served concurrently and followed by two years of supervised release, and a fine of $4,500.00 (R. 118-19, 121). Additionally, the Court ordered Dr. Elder to forfeit $991,114.00, jointly and severally with all the other defendants (R. 121).

Dr. Elder timely appealed to this Court (R. 122-23).

## Summary of the Argument

In order to prove that Dr. Elder distributed controlled substances in violation of the Controlled Substances Act, the Government had to introduce sufficient evidence to show beyond a reasonable doubt that his prescriptions at issue were illegitimate – that is, that he issued them outside the usual course of his medical practice and outside the standard of medical care accepted in the United States. The Government introduced no evidence as to the recognized standard of care or that Dr. Elder violated it. It introduced no evidence that any prescription Dr. Elder ever wrote was not actually for the *bona fide* treatment of a patient. The district court therefore erred in denying his motion for judgment of acquittal.

The district court also erred in holding Dr. Elder liable in a civil forfeiture money judgment for $991,114.00. Unlike his codefendants, he was not charged with any financial wrongdoing. The Government's financial expert even admitted there was no evidence Dr. Elder had profited from any alleged criminal activity. Thus, there was no evidence that Dr. Elder had any property, let alone $991,114.00 of it, which derived from or contributed to the alleged criminal activity.

Finally, given the comparatively scant evidence against Dr. Elder versus the voluminous financial case against Mr. Solomon, the district court erred in denying Dr. Elder's pretrial severance motion. Dr. Elder was severely prejudiced by being tried alongside Mr. Solomon.

## Argument

I. The district court erred in denying Dr. Elder's motions for judgment of acquittal at the close of the Government's case and at the close of all evidence, because the Government presented insufficient evidence against Dr. Elder to prove conspiracy and illegal distribution of prescription medicine. There was no evidence that any prescriptions Dr. Elder issued were for anything other than a legitimate medical purpose.

### Standard of Review

In a criminal case, this Court "reviews the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the government, with all reasonable inferences and credibility determinations made in support of the jury's verdict." *United States v. Smith*, 573 F.3d 639, 657 (8th Cir. 2009). The Court reviews the denial of a motion for judgment of acquittal *de novo*, using the above standard. *United States v. Mitchell*, 613 F.3d 862, 866 (8th Cir. 2010).

* * *

To prove its two charges against Dr. Elder, the Government had to show he dispensed controlled substances in a manner that was outside the national standard of medical care. At trial, however, it only showed that two of Dr. Elder's prescriptions out of thousands were written for deceased people and one was for someone who was not his patient. But the Government's expert admitted this easily could have been because their identities were stolen. He could not say that any of Dr. Elder's prescriptions were outside the national standard of care. Did the district court err in denying Dr. Elder's motions for judgment of acquittal?

**A. The Government was required to prove both (1) what the recognized standard of medical care was that Dr. Elder faced, and (2) that his prescriptions were outside that standard.**

Dr. Elder was named only in counts one and three through ten of the 24-count indictment (Record 42-70). Count one charged him with taking part in a conspiracy to distribute controlled substances illegally, in violation of 21 U.S.C. § 846. Counts three through ten charged him with illegally distributing controlled substances, in violation of 21 U.S.C. § 841.

Count one, conspiracy to distribute controlled substances, consists of four elements: (1) two or more persons reached an agreement or came to an understanding to distribute or dispense Schedule III and/or Schedule IV and/or Schedule V controlled substances, *other* than for a legitimate medical purpose and not in the usual course of professional practice; (2) the defendant voluntarily and intentionally joined in the agreement or understanding; (3) the defendant knew the purpose of the agreement or understanding; and (4) the defendant then also committed one or more overt acts. 21 U.S.C. § 846; *see also* Appendix 71-73.

Counts three through ten, illegal distribution off controlled substances, consists of two elements: (1) the defendant distributed or dispensed a controlled substance; and (2) the defendant knew at the time he was distributing or dispensing the controlled substance that it was for something other than a legitimate medical

purpose, and not in the usual course of professional practice. 21 U.S.C. §§ 841(a)(1), (b)(2), and (b)(3); *see also* Appx. 74-89.

When, as in this case, a defendant facing these charges is a physician and the charges stem from prescriptions he issued in the course of his medical practice, both of these charges additionally require the Government to prove the physician's prescriptions were outside "the usual course of professional practice," meaning that he did not act "in accordance with a standard of medical practice generally recognized and accepted in the United States" (Appx. 90-91).

This is because "licensed physicians" lawfully dispensing controlled substances are specially "registered under the Controlled Substances Act," 21 U.S.C. § 801, *et seq*. *United States v. Moore*, 423 U.S. 122, 124 (1975). In *Moore*, the formative case on this issue, the Supreme Court weighed whether "a licensed physician registered under the Act" could be prosecuted under § 841. *Id.* The Court held they can, but only "when their activities fall outside the usual course of professional practice." *Id.* That is, when the physician's dispensation or distribution of controlled substances was "other than in good faith … in the usual course of a professional practice and in accordance with a standard of medical practice generally recognized and accepted in the United States." *Id.* at 139.

The Government admitted that, even through the time of trial, Dr. Elder was registered with the DEA under the Controlled Substances Act lawfully to prescribe

Schedule III, IV, and V controlled substances, including the medications at issue in this case (Transcript 808-09). Thus, to make for a submissible case that he violated 21 U.S.C. §§ 841 and 846, the Government had to prove beyond a reasonable doubt that Dr. Elder "was acting outside the bounds of professional medical practice, as his authority to prescribe controlled substances was being used not for treatment of a patient, but for the purpose of assisting another in the maintenance of a drug habit or dispensing controlled substances for other than a legitimate medical purpose, i.e., the personal profit of the physician." *United States v. Smith*, 573 F.3d 639, 657 (8th Cir. 2009) (quoting *United States v. Katz*, 455 F.3d 1023, 1028 (8th Cir. 2006)). The jury instructions in this case reflected this requirement (Appx. 74-91).

In order to prove that a physician's prescriptions for controlled substances did not meet the "standard of medical practice generally recognized and accepted in the United States," the Government necessarily must introduce evidence of both (1) what that standard was, and (2) that the physician's prescriptions did not meet that standard. *Smith*, 573 F.3d at 657-58.

*Smith* exemplifies how the Government must meet this burden. A pharmacist was charged with conspiracy to violate § 841 by knowingly filling prescriptions that a co-conspiring doctor had written outside the course of legitimate practice. *Id.* The doctor testified he had not written the prescriptions for

actual patients. *Id.* Additionally, however, the Government introduced expert medical testimony "regarding the applicable standard of care." *Id.* at 658. In detail, the expert "identified several factors pointing to the conclusion that the … prescriptions were thus invalid." *Id.* For example, he testified that the prescriptions were "for excessive quantities of drugs relative to the medical condition the prescription was allegedly treating," were at times for "a drug that was not intended or appropriate to treat the claimed ailment," and were written in batches of "over 1,000 in a single day," which was physically impossible. *Id.* With this evidence, the Government had met its burden vis-à-vis the generally accepted standard of medical care. *Id.*

As in *Smith*, cases in which the Government's case against a physician charged with violating § 841 in prescription-writing was held to be sufficient invariably have involved substantial evidence that the physician: (1) did not actually examine patients for whom he wrote prescriptions; (2) did not obtain information from patients of a quality from which he could diagnose conditions and prescribe medicine to treat them; and (3) there was no legitimate doctor-patient relationship. See, e.g., *Smith*, 573 F.3d at 657-58; *Katz*, 455 F.3d at 1028; *Moore*, 423 U.S. at 125-27; *United States v. Hayes*, 595 F.2d 258, 261 (5th Cir. 1979).

In *Smith*, the physician admitted his prescriptions were illegitimate and the Government proved he had written 72,000 prescriptions during the conspiracy,

sometimes as many as 1,000 per day; the Government's expert testimony bolstered the logical conclusion that legitimately seeing 1,000 patients per day was impossible. 573 F.3d at 657-58. In *Moore*, the physician wrote over 100 methadone prescriptions per day for a 54-day period after his controlled substance registration was revoked, saw the patients only "perfunctorily" and prescribed however much methadone they wanted, and ultimately conceded "that he did not observe generally accepted medical practices." 423 U.S. at 126. Moreover, the physician's patients testified to all of this. *Id.*

Similarly, in *Katz*, the Government introduced into evidence 192 prescriptions covering just 15 patients, three of whom actually were undercover police. 455 F.3d at 1028. The officers testified that the physician prescribed them Xanax and Valium without any *bona fide* medical exam and simply upon their request. *Id.* at 1026-28. Then, twelve other patients testified to this same, illegitimate prescription method. *Id.* Finally, a medical expert testified as to the standard of medical care and explained that the physician's method that the officers and patients had recounted was "outside of the scope of legitimate medical practice and without a legitimate medical purpose." *Id.* at 1026-27.

Conversely, where no expert explains the standard of medical care and that the physician's prescriptions were outside that standard, and no patients even testify that the prescription methods were suspect, the Government's case is

insufficient. In *United States v. Cuong*, a physician was convicted of 136 counts of violating § 841 for allegedly writing illegitimate prescriptions; each count corresponded to a particular prescription. 18 F.3d 1132, 1133 (4th Cir. 1994). The Government's expert medical witness testified that the charts for some of the patients receiving prescriptions at issue showed their prescriptions were "totally unreasonable and … not appropriate" for the physician's practice. *Id.* at 1135. As to the counts related to those charts, the Fourth Circuit affirmed the jury's verdict. *Id.*

But the expert did not review the charts for 80 of the allegedly invalid prescriptions, nor did the patients who received those prescriptions testify. *Id.* at 1138-41. Thus, as to those 80 counts, the Fourth Circuit held that "the government has not carried its burden of proving defendant's guilt … beyond a reasonable doubt," and reversed. *Id.* at 1141. The Government had not introduced any evidence to show what the applicable standard of care was for those patients or that their prescriptions were illegitimate. *Id.*

The counts concerned 20 different patients "who did not testify," the Government's expert did not discuss those patients or comment on their prescriptions, and merely superficially appeared to "follow a pattern." *Id.* The Fourth Circuit held, "This is not sufficient to convict a person of a felony, and it concerns us that, as to these 80 counts, defendant may have been found guilty of

some counts by association – the association of the counts properly proved with those that were not." *Id.*

**B. The Government failed to prove either (1) what the recognized standard of medical care was that Dr. Elder faced, or (2) that any of his prescriptions were outside that standard.**

Conversely to *Smith*, *Katz*, *Moore*, and other cases in which the Government's evidence against a physician convicted of violating § 841 was found to be sufficient, in this case the Government introduced no evidence as to either (1) what the recognized standard of medical care in the United States is for Dr. Elder's practice, or (2) that the prescriptions at issue in this case somehow were outside that standard. Neither any Government expert nor any patient testified that Dr. Elder did not actually examine patients for whom he wrote the eight prescriptions reflected in counts three through ten of the indictment, did not obtain information from those patients from which he could diagnose their conditions and prescribe the medicine, or that there was no legitimate doctor-patient relationship from which the prescription stemmed.

Rather, the testimony from the Government's own witnesses was that Dr. Elder saw numerous patients at both STWC and WMC (Tr. 474, 4766-77, 648-651, 669-673). They further admitted that the form of the prescriptions complied with the requirements of Texas law (Tr. 266-67, 938, 961-62).

The Government's medical expert, Dr. Richard Morgan, was not asked whether any of the prescriptions charged as illegitimate in counts three through ten were "issued without a legitimate medical purpose and issued outside the usual course of professional practice" (Tr. 937-89). He was never asked to explain what the "standard of medical practice generally recognized and accepted in the United States" was that Dr. Elder faced (Tr. 937-89). He did not testify that Dr. Elder disregarded "prevailing standards of treatment" (Tr. 937-89).

Rather, his testimony only went to the faxes of the prescriptions that *Mr. Solomon* sent to Missouri, which he called "unusual", not Dr. Elder's underlying prescription (Tr. 944-46, 986-88). Instead, he openly admitted that the four prescriptions charged as illegitimate in counts three through six appeared normal, differing as to date and dosage (Tr. 963-67). He agreed that "they appear to be regular on their face," and there appeared to be "nothing unusual or sinister about them" (Tr. 967). He acknowledged that, "without having the full patient record and everything here to review today," he could not "second guess what [Dr. Elder] did in those four cases" (Tr. 967).

Simply put, Dr. Morgan did not testify as to either what the accepted standard of medical practice was or that any of Dr. Elder's prescriptions were outside that standard. As in *Cuong*, he was not asked to review the prescriptions or, regarding the patients or prescriptions comprising counts seven through ten, the

persons who it turned out were deceased (Tr. 752-56). But Dr. Morgan explained that this was not unusual and in fact easily could be explained: identity theft is common in pain management practice for low-income individuals, such as in Dr. Elder's practice, and can go undetected by both the doctor and his staff (Tr. 978-80). He stated this had happened before in his own pain management practice (Tr. 978-80).

Just as with the 80 conviction counts reversed in *Cuong*, Dr. Morgan did not testify that any of Dr. Elder's prescriptions from which counts three through ten stemmed were written outside the scope of legitimate medical practice. He had not examined any of Dr. Elder's patients identified on any of those allegedly illegitimate prescriptions or even studied their charts.

The Government also did not show that the medications Dr. Elder prescribed did not fit the conditions they were to treat. Dr. Morgan suggested that using the same medications (hydrocodone, alprazolam, and/or promethazine) for many patients was "unusual" (Tr. 986-88). But this did not make them illegitimate (Tr. 986-88).

Other Government witnesses testified that prescribing the same amounts of hydrocodone and alprazolam to pain patients was normal. Missouri Board of Pharmacy inspector Frank Van Fleet testified that hydrocodone and alprazolam often are prescribed together to alleviate both pain (hydrocodone) and the anxiety

that accompanies it (alprazolam) (Tr. 434, 437-38). C&G pharmacists Sunny Chin and Magdalena Ortega also saw nothing illegitimate in these prescriptions; Mr. Chin said all of Dr. Elder's prescriptions were for actual patients, and there was nothing irregular about them (Tr. 621-28). Ms. Ortega specifically testified it was not unusual for a pain management physician like Dr. Elder to write a series of prescriptions for different patients but for the same medications at the same dosages (Tr. 637-47).

Most importantly, the Government never called any of Dr. Elder's patients to testify – in particular, not the four patients whose prescriptions correspond to counts three through six. A postal inspector merely testified the addresses reported on their prescriptions did not exist in the U.S. Postal Service's database (Tr. 217-222; Government Exhibit 1172). But no witness stated these people did not exist. Dr. Morgan even suggested it was entirely possible these patients had used false identification (Tr. 978-80). And addresses were not required on Texas prescriptions during this time at all (Tran. 961-62; Tr. 266-67, 938, 961-62, 1267-69). As opposed to *Smith* and *Katz*, *supra*, there was no patient testimony that Dr. Elder had not seen them, had given them whatever they wanted, had operated illegitimately, or had not in any other way written them a *bona fide* prescription.

All the Government's evidence against Dr. Elder showed was that, out of thousands of patients, he wrote four prescriptions that somehow wound up with the

wrong address and two that entirely could have been for identity thieves. This was utterly insufficient to prove that he, a licensed physician registered with the DEA to dispense controlled substances lawfully, conspired to and engaged in distributing narcotics in violation of § 841.

Rather, the Government was required to prove that the prescriptions fell "outside the usual course of professional practice" – that is, that they were "other than in good faith in the usual course of [his] professional practice and in accordance with [the] standard of medical practice generally recognized and accepted in the United States." *Moore*, 423 U.S. at 124, 139. It had to introduce evidence sufficient to show beyond a reasonable doubt that Dr. Elder "was acting outside the bounds of professional medical practice, as his authority to prescribe controlled substances was being used not for treatment of a patient, but for the purpose of assisting another in the maintenance of a drug habit or dispensing controlled substances for other than a legitimate medical purpose, i.e., the personal profit of the physician." *Smith*, 573 F.3d at 657 (quoting *Katz*, 455 F.3d at 1028).

The Government did not meet this burden of proof. Unlike *Smith*, there was no evidence "regarding the applicable standard of care," no evidence that Dr. Elder had not written the prescriptions for actual patients, and no evidence that the prescriptions themselves were otherwise invalid. Unlike *Katz*, *Moore*, and *Hayes*, there was no evidence that Dr. Elder did not actually examine patients for whom he

wrote the allegedly illegitimate prescriptions, did not obtain information from patients of a quality from which he could diagnose conditions and prescribe medicine to treat them, or that there was no legitimate doctor-patient relationship.

Instead, the Government's case was entirely one merely of supposition. If an unrequired address was incorrect or the name of the person on the prescription was actually deceased, the Government supposes it was illegitimate. But the Government's own witnesses explained perfectly normal, valid, and accepted reasons for these superficial anomalies. The Government's suggestions are not evidence of a quality from which it could meet its burden of proof.

Conversely, this case mirrors *Cuong*. No expert explained the standard of medical care and that Dr. Elder's prescriptions were outside that standard. 18 F.3d at 1141. No patients testified that his prescription methods were suspect. In fact, several Government witnesses testified that there was nothing medically illegitimate about any of the prescriptions from which counts three through ten stemmed. The supposedly suspect prescriptions merely superficially appeared to "follow a pattern." *Id.* But this "is not sufficient to convict a person of a felony …." *Id.* Thus, "the government has not carried its burden of proving [Dr. Elder]'s guilt … beyond a reasonable doubt," and the judgment of conviction and sentence against him must be reversed. *Id.*

The Government submerged the jury in copies and lists of prescriptions (Govt. Exs. 1-32, 35-452, 454-55, 517-28, 530, 534, 539, 542, 986, 1085-86, 1089-90, 1103). But no patient testified that he or she did not receive their medication as prescribed. The Government's medical expert did not examine any patient or study any chart. He did not explain the national standard of care for prescriptions in a pain management practice like Dr. Elder's. He did not testify that Dr. Elder's prescriptions, including those charged in the case, violated any such standards.

Thus, as *Moore*, *Smith*, *Katz*, and *Cuong* explain, even viewing the evidence in a light most favorable to the jury's verdict, the Government's evidence was insufficient to prove its charges against Dr. Elder beyond a reasonable doubt. Accordingly, the district court erred in denying his motion for judgment of acquittal.

This Court should reverse the district court's judgment of conviction and sentence against Dr. Elder.

II. The district court erred in joining Dr. Elder in its $991,114.00 civil forfeiture order, because a convicted defendant only can be ordered to forfeit property to the extent that the evidence shows he profited from the alleged criminal activity. There was no evidence whatsoever that Dr. Elder profited from his alleged criminal activity.

Standard of Review

This Court reviews a district court's factual findings in a civil forfeiture order for clear error. *United States v. Van Nguyen*, 602 F.3d 886, 903 (8th Cir. 2010). The Court reviews *de novo* whether the district court's findings make forfeiture appropriate. *Id.*

* * *

Under Rule 32.2(b), Federal Rules of Criminal Procedure, a convicted defendant can be ordered to forfeit property only to the extent that the evidence shows there is a nexus between that property and his profit from the alleged criminal activity. In this case, while there was evidence that other defendants profited from the alleged conspiracy, the Government conceded at trial that there was no evidence Dr. Elder had made any profit. He was neither charged with nor convicted of money laundering. Nonetheless, the district court made him jointly and severally liable in its $991,114.00 forfeiture order. Was this error?

In this case, invoking 18 U.S.C. § 981(a)(1)(C) and Rule 32.2(b), the Government requested an order of forfeiture against Dr. Elder, jointly and severally with the other defendants, for $991,114.00 as a money judgment

(Appendix 39, 92-98). Dr. Elder objected that forfeiture was improper as to him, as there was no evidence he had profited from the alleged "pill mill" conspiracy (Appx. 40, 99-112). The district court granted the Government's request and included him in its order making Dr. Elder jointly and severally liable for a money judgment of $991,114.00 (Appx. 44, 117, 118-19).

Section 981(a)(1)(C) subjects a defendant convicted of Dr. Elder's offenses to forfeiture of "[a]ny property, real or personal, *which constitutes or is derived from proceeds traceable* to" his violations. (Emphasis added). Rule 32.2 requires the district court to determine, based on the evidence "what property is subject to forfeiture" and "whether the government has established the required nexus between the property and the offense." Because there was no evidentiary hearing over the Government's forfeiture motion (Appx. 39-44), the evidence for forfeiture was limited to that "already in the record." Rule 32.2(b). As applied to drug crimes, the purpose of this rubric is to "assure[] that a drug dealer is deprived of the economic power generated by illegally deprived wealth." *United States v. Bucci*, 582 F.3d 108, 124 (1st Cir. 2009).

Thus, "An asset is subject to forfeiture only if the government proves by a preponderance of the evidence such asset is 'property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of'" the crime, or was "'used, or intended to be used, in any manner or part, to commit, or

to facilitate the commission of, such violation.'" *United States v. Van Nguyen*, 602 F.3d 886, 903 (8th Cir. 2010) (quoting 21 U.S.C. § 853). If the Government has not proved this by a preponderance of the evidence for a given asset, an order forfeiting that asset is error and must be vacated. *Id.*

In this case, the Government failed to prove that Dr. Elder had either $991,114.00 or any other asset that was property constituting, or derived from, any proceeds he obtained, directly or indirectly, as a result of his alleged criminal activity, or that was used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such an activity. In fact, it conceded at trial that there was *no* evidence whatsoever that he had profited *in any way* from the criminal conspiracy of which he was accused. The district court erred in including him in its civil forfeiture money judgment, and that order must be vacated.

The Government obtained its $991,114.00 dollar figure from Mary Lynn Rostie's consent to a judgment in this amount as part of her plea agreement (Tr. 306-07). This amount apparently corresponded to the total sum that Mr. Solomon sent to Ms. Rostie through Ms. Martin (Tr. 306-07). There was no other mention of this amount anywhere at trial.

Similarly missing, however, was any evidence that Dr. Elder had profited from Mr. Solomon sending money to Ms. Rostie through Ms. Martin. Tellingly, Dr. Elder was not even named in the money laundering charges of the 24-count

indictment. But the Government nonetheless contended that Dr. Elder should be responsible for the gross proceeds jointly and severally with Mr. Solomon, Ms. Rostie, and Ms. Martin, without any regard or distinction as to his alleged period of involvement in the conspiracy and without regard to its complete lack of evidence that he had profited from the conspiracy.

The Government's financial expert, Lorie Nelson, prepared charts using bank information from Ms. Rostie and Ms. Martin to show their extreme numbers of cash deposits during the period of their conspiracy (Transcript 886-89). She also analyzed the tax returns of Mr. Solomon, Ms. Rostie, and Ms. Martin, during that period (Tr. 889-92).

Conspicuously missing from all of this, however, was any analysis of Dr. Elder's finances (Tr. 890-95). This was because Ms. Nelson had not performed any (Tr. 890-95). Rather, she testified that although Dr. Elder was a suspect in the alleged conspiracy as early as 2006, he was indicted in 2008, and she knew what the charges were against him when analyzing the other defendants' finances, she was not asked to and did not examine his finances (Tr. 892-96).

Ms. Nelson analyzed neither his taxes nor his bank records nor his net worth (Tr. 890-96). She acknowledged that he lived in an apartment, unlike the other participants in the alleged conspiracy, who had bought luxury houses with their ill-gotten gains (Tr. 890-95). Instead, as Ms. Nelson acknowledged, in 2004-05, the

IRS had audited Dr. Elder, and he *still* had received tax refunds (Tr. 797, 894). She testified that he had made only $200,000.00 in properly reported, lawful gains from WMC (Tr. 894-95). As a result of this, he was not even a "financial target" of her investigation (Tr. 894-95). Conversely, the only actual evidence of Dr. Elder's finances was that he had several outstanding student loans, a large mortgage, and no financial gain as a result of any dealings with Mr. Solomon or the other codefendants (Tr. 1283).

Dr. Elder was not even remotely implicated in any discussions of profits from the alleged criminal enterprise of Mr. Solomon, Ms. Rostie, and Ms. Martin, all of which came from Ms. Nelson. Ms. Nelson testified to the amount of cash deposits of Ms. Martin and Ms. Rostie (Tran. 886, 888-890; Govt. Exs. 1143, 1145). None of this evidence mentioned Dr. Elder.

Even if the Government's supposition that $991,114.00 represents a fair value of Mr. Solomon's, Ms. Rostie's, and Ms. Martin's scheme, there simply was no evidence that any portion of this amount went to, or benefited, Dr. Elder. There was no evidence of "[a]ny property, real or personal, which constitute[d] or [was] derived from proceeds traceable to" his alleged criminal activities. 18 U.S.C. § 981(a)(1)(C). As to Dr. Elder, the Government simply did not establish "the required nexus between the property and [his] offense," as Rule 32.2 requires.

There was no "economic power generated by illegally deprived wealth" such as would merit or be subject to civil forfeiture. *Bucci*, 582 F.3d at 124.

As such, the Government did not meet its burden to establish, by preponderance of the evidence, that Dr. Elder had any assets, let alone $991,114.00, that was "property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of" his alleged crimes, or which was "'used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation." 21 U.S.C. § 853. Accordingly, the district court's order forfeiting that monetary asset was error. *Van Nguyen*, 602 F.3d at 903. This Court must vacate it. *Id.*

The Court should vacate the district court's forfeiture order as to Dr. Elder.

III. The district court erred in joining Dr. Elder with Mr. Solomon, because the Government's case against Dr. Elder was such that a reasonable juror could not be expected to compartmentalize it versus the case against Mr. Solomon. The indictment did not charge Dr. Elder with participation in any financial aspect of the alleged conspiracy, and no evidence was introduced to show that he profited from any alleged criminal activity. The vast majority of evidence at trial concerned only Mr. Solomon and his illicit financial gain. Joining Dr. Elder with Mr. Solomon conflated the charges against him with the greater charges against Mr. Solomon and confused the jury.

Standard of Review

This Court review a "claims of misjoinder de novo and the denial of [a] motion to sever for abuse of discretion." *United States v. Liveoak*, 377 F.3d 859, 864 (8th Cir. 2004). Reversal for misjoinder is required where it "resulted in actual prejudice, i.e., the misjoinder has 'a substantial and injurious effect or influence in determining the verdict.'" *United States v. Jenkins-Watts*, 574 F.3d 950, 967 (8th Cir. 2009) (quoting *Liveoak*, 377 F.3d at 865).

* * *

A district court should sever jointly indicted defendants' trials if joinder appears to prejudice a defendant. In this case, the indictment did not accuse Dr. Elder of any financial wrongdoing, whereas it accused Mr. Solomon of money laundering in addition to the other counts. At trial, the vast majority of the evidence concerned only Mr. Solomon and his illicit financial gain. Nonetheless, the district court denied Dr. Elder's motion for severance. Did joining Dr. Elder with Mr. Solomon prejudice Dr. Elder?

Rule 8(b), Federal Rules of Criminal Procedure, provides that an indictment "may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." "All defendants need not be charged in each count, and the prerequisites are liberally construed in favor of joinder." *United States v. Liveoak*, 377 F.3d 859, 864 (8th Cir. 2004).

Still, if joinder with a codefendant appears to prejudice a defendant, the district court should sever him for trial. Rule 14(a), Federal Rules of Criminal Procedure. "To grant a motion for severance, the necessary prejudice must be severe or compelling." *Liveoak*, 377 F.3d at 864 (quoting *United States v. Pherigo*, 327 F.3d 690, 693 (8th Cir. 2003)). "Severance becomes necessary where the proof is such that a jury could not be expected to compartmentalize the evidence as it relates to the separate defendants." *United States v. Jenkins-Watts*, 574 F.3d 950, 967 (8th Cir. 2009).

In this case, Dr. Elder was named only in counts one and three through ten of the 24-count indictment, charging him with conspiracy to and engaging in distribution of controlled substances in violation of the Controlled Substances Act (Record 42-79). Conversely, the other defendants, including Mr. Solomon, were charged in count two with conspiracy to commit money laundering (R. 49-51). Dr.

Elder was not named in that count (R. 49-51). The indictment did not accuse him of any financial wrongdoing (R. 42-79).

Long before trial, Dr. Elder moved the district court to sever him from the other defendants, as his joinder with the other defendants would severely prejudice him by conflating the evidence against him with the wholly separate evidence against Mr. Solomon and the other defendants (Appendix 4, 48-51). The district court denied his motion (Appx. 21-22, 52-70).

This was severely prejudicial error. After trial, it is apparent from the Record that the "jury could not be expected to compartmentalize the evidence as it relate[d]" to Dr. Elder, *Jenkins-Watts*, 574 F.3d at 967, given the immense, separate volume of evidence against Mr. Solomon the Government introduced to prove its money laundering charge. Indeed, after voluminously exploring the financial evidence against Mr. Solomon, the Government's financial expert admitted there was no evidence that Dr. Elder had profited in any way from the alleged criminal activity (Transcript 797, 894-95).

The course of the trial only further shows how disparate the evidence was between Dr. Elder and Mr. Solomon. Of the Government's 25 witnesses, only eight testified anything about Dr. Elder: Ms. Rostie (Tr. 238-323), Mr. Van Fleet (Tr. 412-56), Dr. Johnson (Tr. 469-558), Mr. Chin (Tr. 621-29), Ms. Ortega (Tr. 629-48), Ms. Hearn (Tr. 648-74), Ms. Watterson (Tr. 690-823), and Dr. Morgan

(Tr. 937-89). The rest testified only about the actions of Mr. Solomon, Ms. Rostie, and Ms. Martin, primarily their financial conspiracy alleged in count two.

Under these circumstances, the jury could not reasonably be expected to compartmentalize the comparatively scant evidence against Dr. Elder given the volume of financial data and financially-related evidence against Mr. Solomon. Indeed, as the above citations to the transcript show, the eight witnesses who testified regarding Dr. Elder, as opposed to Mr. Solomon, were spaced throughout the trial.

Instead, from a juror's perspective, seeing Dr. Elder and Mr. Solomon sitting together at the defense table and hearing a huge volume of detailed evidence against Mr. Solomon, much of it as to his illicit financial gains, Dr. Elder simply was "guilty by association." And, like Mr. Solomon, the jury found Dr. Elder guilty on all counts. If Dr. Elder had been tried separately, however, the comparative slightness of the Government's case against him (illustrated in Issue One, above) would have come out more fully.

It is readily apparent from the face of the Record that joining Dr. Elder with Mr. Solomon for trial prejudiced him. Thus, the district court should have severed his trial from that of Mr. Solomon, Rule 14(a), because the prejudice was "severe" and "compelling." *Liveoak*, 377 F.3d at 864 (quoting *Pherigo*, 327 F.3d at 693). Weighed against the evidence against Mr. Solomon, the Government's attempted

proof against Dr. Elder was "such that a jury could not be expected to compartmentalize the evidence as it relates to the separate defendants." *Jenkins-Watts*, 574 F.3d at 967. As a result, and in the interests of providing Dr. Elder with a fair trial, severance was necessary. *Id.* The district court abused its discretion in denying Dr. Elder's motion to sever.

Thus, if the Court does not reverse the district court's judgment of conviction and sentence for the reasons stated in Issue One, above, it should reverse the judgment and remand this case with instructions to retry Dr. Elder separately.

## Conclusion

This Court should reverse the district court's judgment of conviction and sentence against Dr. Elder. It also should vacate the district court's forfeiture order as to Dr. Elder.

Respectfully submitted,

/s/Dennis Owens
Dennis Owens, Attorney
7th Floor, Harzfeld's Building
1111 Main Street
Kansas City, Missouri 64105
Telephone: (816) 474-3000
Facsimile: (816) 474-5533

*Jonathan Sternberg, Attorney, P.C.*

by /s/Jonathan Sternberg
Jonathan Sternberg, Attorney
7th Floor, Harzfeld's Building
1111 Main Street
Kansas City, Missouri 64105
Telephone: (816) 474-3000
Facsimile: (816) 474-5533

Counsel for Appellant
Christopher Elder

**Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements**

I hereby certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 12,907 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), because this brief has been prepared in a proportionally spaced typeface, Times New Roman size 14 font, using Microsoft Word 2010.

I further certify that the electronic copies of both this Brief of the Appellant and the Addendum filed via the Court's ECF system are exact, searchable PDF copies thereof, that they were scanned for viruses using Microsoft Security Essentials and, according to that program, are free of viruses.

/s/Jonathan Sternberg
Attorney

## Certificate of Service

I hereby certify that on August 23, 2011, I electronically submitted the foregoing to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF system.

/s/Jonathan Sternberg
Attorney